IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-104

UNITED JEWISH ORGANIZATIONS
OF WILLIAMSBURGH, INC., et al.,

Petitioners,

v.

HUGH L. CAREY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS (COLPA) AND THE AMERICAN JEWISH COMMITTEE AS AMICI CURIAE

DENNIS RAPPS
c/o National Jewish Commission
on Law and Public Affairs (COLPA)
66 Court Street
Brooklyn, New York 11201

SAMUEL RABINOVE
c/o American Jewish Committee
165 East 56th Street
New York, New York 10022

Attorneys for Amici

HARVEY BLITZ
STEWART WAHRSAGER,
Of Counsel

Dick Bailey Printers — Tel. (212) 447-5358

TABLE OF CONTENTS

TABLE OF CASES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-104

UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH, INC., et al.,

Petitioners,

v.

HUGH L. CAREY, et al.,

Respondents.

ON WRIT OF CERITORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS (COLPA) AND THE AMERICAN JEWISH COMMITTEE AS AMICI CURIAE

This brief is being filed in support of the petitioners with the consent of the parties.

QUESTIONS PRESENTED

1. Whether the standard employed by the United States Department of Justice, that a proscribed effect "may" exist, is the proper standard by which the Attorney General may disapprove a redistricting plan under the Voting Rights Act.

2. Whether in the absence of a prior history of racial discrimination, a state legislature, at the insistence of the United

States Department of Justice, may redistrict voting districts to create an election district consisting of 65% non-whites and 35% whites for the avowed purpose of maximizing non-white representation.

3. Whether federal remedial action may be invoked in a race case where there has been no finding of prior wrong and there is no reasonable relationship between the presumed wrong and the chosen remedy.

INTEREST OF THE AMICI

The National Jewish Commission on Law and Public Affairs ("COLPA") is a voluntary association of attorneys and social scientists organized to combat religious prejudice and discrimination, and to represent the position of the Orthodox Jewish Community on matters of public concern. COLPA has appeared in those capacities in numerous cases before this Court and other courts.

The American Jewish Committee was incorporated by an Act of the Legislature of the State of New York in 1906. Although its chief purpose is to protect the civil and religious rights of Jews, the American Jewish Committee has from its very inception been devoted to the attainment of these aims for all Americans. Among the numerous cases, not directly concerning the rights of Jews, in which the American Jewish Committee has interceded as *amicus curiae* are *Brown v. Board of Education*, 347 U.S. 483 (1954), *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), and *Lau v. Nichols*, 414 U.S. 563 (1974).

The *amici* submit this brief because they deeply believe that the social and political structure of this nation are imperiled where, as here, government action has purposefully diluted the voting power of one ethnic group in order to strengthen another. Should this exercise of power go unchecked, an insidious and dangerous concept will take hold and undermine our basic freedoms as well as the necessary unity of our diverse and pluralistic society.

PRELIMINARY STATEMENT

This case involves a challenge by members of a community to a districting plan that was designed solely to vitiate their effective participation in the electoral process in order to ensure that a politically less active and organized racial group would elect the representatives of its choice. Contrary to 200 years of tradition in American government, an attempt has been made to guarantee a preordained result within political institutions in favor of a particular racial group. This despite the fact that access to the electoral process by the latter group was demonstrably unfettered and indeed that it constituted a significant majority in the challenged districts. On this record that effort stands as perhaps the rawest and most arbitrary exercise of power the *amici* have witnessed. The United States Justice Department, with the constrained agreement of the New York legislature and the unfortunate concurrence of the courts below, has changed the focus of future actions to attain electoral equality from efforts to secure access to the political institutions of our nation to one of control. A more insidious development and greater potential for racial and ethnic divisiveness is hard to imagine.

Under the 1972 redistricting plan petitioners, who are white, found themslves in an Assembly district that had a non-white population of 61.5%. At the least this percentage should pose no impediment to members of the non-white community to freely organize into an effective political force. Yet the Justice Department deemed this figure inadequate and a 65% non-white majority was deemed required, not because there was a showing of purposeful efforts at, or even an unintended effect of, diluting non-white voting strengths. Nor, indeed was there any evidence of any effort to capitalize on the political passiveness of non-white residents of the area. The only reason given by the Justice Department for the disapproval of the 1972 plan was that certain districts were viewed as having high minority concentration while adjoining minority neighborhoods were diffused into a number of other districts and that it "believe[d] other

rational alternatives exist". (510 F2d at 526) However, while section 5 of the Voting Rights Act grants to the Attorney General authority (pursuant to *Georgia v. United States*, 411 U.S. 526 (1973)) to shift the burden of proof that a districting plan does not abridge the right to vote, here the Justice Department required much more; it required the State of New York to prove that there were no alternative plans that would result in more non-white legislators. Equal access to an electoral process unaffected by discriminatory devices is no longer enough, the Justice Department ruled. The Voting Rights Act was thus used as a lever to coerce the New York legislature to adopt a districting plan that should elect non-white legislators. There is neither judiciary authority nor justification in the Constitution or the Voting Right Act for such an objective.

The perversion of all governmental efforts heretofore at securing equal opportunity is not all that requires reversal in this case. As often happens, the rationales employed to justify dangerous premises are themselves similarly infirm and create their own dangers. Even the Attorney General did not "find" that the proscribed abridgment of the right to vote because of race or color was in fact present under the 1972 plan but only that the "proscribed effect *may* exist." (Emphasis provided). (510 F2d at 517 fn. 5) There was also no relation shown between the 65% figure as a remedy and the chimerical "wrong". The open-ended and unrestrained power assumed by the Justice Department is frightening in its implications and should not, we submit, be countenanced by this Court.

ARGUMENT

I

THE JUSTICE DEPARTMENT EMPLOYED AN INVALID AND UNFAIR STANDARD IN DETERMINING THAT THE 1972 REDISTRICTING WAS INVALID.

Section 5 of the Voting Rights Act prohibits the denial or abridgment of the right to vote. A districting plan could indeed operate to deny or abridge that right. But nowhere did the Justice Department determine that the 1972 redistricting plan had this prohibited effect. Instead, the Justice Department invalidated the 1972 redistricting by boldly asserting, with no proof, that the "proscribed effect *may* exist". (510 F2d at 517 fn. 5) This assertion is wholly inadequate to support the exercise of the supervisory powers granted to the Attorney General by the Voting Rights Act.

In *City of Richmond v. United States*, 422 U.S. 358 (1975), this Court held that in the absence of a purposeful dilution of the voting power of non-whites, the Justice Department has no authority to invalidate a local legislative action. In that case, the City of Richmond had annexed a portion of a neighboring county, thereby increasing the number of white voters in the city. This Court held that if the annexation could be justified by non-racial considerations, the Voting Rights Act would not invalidate a districting plan, fairly drawn, in the context of the city after the annexation. Here, the Attorney General never even asserted that the 1972 redistricting plan was not fairly drawn. Rather, he apparently believed that his authority under the Voting Rights Act permitted (or required) him to insist on a plan which would maximize the voting power of non-whites. It is clear from *City of Richmond* that the Attorney General has no such power. The responsibility for drawing district lines lies with the legislature alone, and only if the legislature acts to create an "unfair" plan can the Attorney General step in. Contrary to the Attorney

General's apparent belief, a "fair" plan is one which is fair to whites and non-whites alike.

The reasoning of this Court in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), is similarly instructive. In that case this Court reversed a lower court decision striking down an Indiana apportionment plan employing multimember legislative districts because it diluted the voting strength of blacks living in a ghetto area. The Court said in *Whitcomb* (at 149-50):

> We have discovered nothing in the record or in the Court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen . . . The mere fact that one interest group or another concerned with the outcome of Marion County elections has found itself outvoted and without legislative seats of its own provides *no basis for invoking constitutional remedies where*, as here, *there is no indication that this segment of the population is being denied access to the political system.* (Emphasis provided)

The racial classification which was the underlying premise of the redistricting plan adopted by the New York Legislature at the behest of the Department of Justice was not a remedy for a definable wrong committed by the State of New York against its non-white voters. In fact, New York is only subject to the supervision of the Attorney General pursuant to the Voting Rights Act because of its failure to provide Spanish translations on ballots (510 F2d at 516) and Puerto Rican spokesmen objected to the districting plan at issue here (510 F2d at 529). Indeed blacks and other non-whites have full voting rights in New York and have the same opportunity to vote and be elected as their fellow citizens.

II

THE ARBITRARY MAXIMIZATION OF MINORITY LEGISLATORS IS NOT A CONSTITUTIONALLY PERMITTED GOAL OF GOVERNMENT

The conceded premise underlying the disapproval of the 1972 redistricting plan was that it did not guarantee the election of a candidate elected by non-white members of particular communities. We submit that this premise and the governmental policies emanating therefrom are wholly unconstitutional. One should not believe that all that is at issue here is the maximization of political power of a particular racial group. That alone would, of course, raise the gravest constitutional questions. Mr. Justice Douglas concurring in *Whitcomb v. Chavis, supra*, 176-77, stated that it was impermissible to fashion electoral districts "so as to make the voice of one racial group weak or strong, as the case may be." Rather we are beyond that point and are faced with a governmental scheme of flat proportional representation based on race.

Under the facts of this case, is it reasonable to assume that a legislator representing a district that is 65% non-white will be more responsive to his non-white constituents than if his constituents are 61.5% non-white? Surely *election* of a non-white representative is the objective of the 65% figure. This plan thus goes beyond the scheme struck down by this Court in *Anderson v. Martin*, 375 U.S. 399 (1964). In its unanimous opinion, this Court held that the racial designation on the ballot which was at issue in that case, and which would have benefited black candidates, would impermissibly "induce racial prejudice at the polls." (375 U.S. at 402). Can there be any doubt but that the insistence by the Justice Department on its 65% figure not only presumes such prejudice but in fact fosters it.

The intensification of racial considerations at the polls contributes to the exacerbation of racial problems unfortunately rife in our society. Certainly it does not tend towards their alleviation which should be first and foremost in the minds of

governmental agencies. But equally pernicious is its subversive effect on the electoral process as a whole. Mr. Justice Douglas spoke to this in his separate opinion (dissenting on the facts) in *Wright v. Rockefeller*, 376 U.S. 52 (1964) at 67:

> "When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one becomes separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here."

Aside from the constitutional considerations we note parenthetically that depriving the white residents in a racially mixed area of equal representation through purposeful dilution of their vote will inevitably add to urban instability by persuading such residents to move and thereby further aggravate racial segregation, the deterioration of the "inner city" and the quality of urban life.

A major problem presently facing virtually every large urban American municipality concerns the economic and social difficulties engendered by ethnic succession of inner city neighborhoods. The swift replacement of one ethnic group, usually urged along by "block busting", with a second, generally less affluent ethnic group, emphasizes racial and ethnic differences and also tends to transform stable neighborhoods into slums. While the causes of this urban ill are many and complex, it should be clear that reducing the political effectiveness of one group at the expense of another signifies to the weakened group that the other is in the ascendancy, thus hastening the course of this destructive phenomenon.

In sum, the touchstone of a free people is equality of opportunity. This is accomplished by insuring that there is free and untrammeled access to the institutions of our society. The gross abuse of power exercised by the Department of Justice in this case, with its ominous implications, underscores the wisdom of abjuring the use of categories which emphasize group membership rather than individual rights.

III

FEDERAL REMEDIAL ACTION MUST BE NARROWLY EXERCISED, ESPECIALLY WHEN RACIAL CLASSIFICATIONS ARE INVOLVED

Recognizing that federal remedial power contains the seeds of serious consequences for important rights, and therefore may represent a dangerous if necessary evil in order to redress wrongs, this Court has always insisted on exactitude in its exercise. In *Milliken v. Bradley*, 418 U.S. 717, 738 (1974) this Court, in discussing the limits of federal remedial power, repeated its earlier statement in *Swann v. Charlotte-Mecklenburg Board of Education* (420 U.S. 1 (1971)) that "the nature of the violation determines the scope of the remedy," and stated further that "the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct."

It is also well settled that any racial classification emanating from "official state sources" carries with it a heavy presumption of unconstitutionality. *Loving v. Virginia*, 388 U.S. 1, 10 (1967). The kind or degree of deprivation resulting from racial classification is immaterial; nor does it matter that the consequences of such classification fall evenly on more than one race or on all races. *Loving v. Virginia, supra; Hunter v. Erickson*, 393 U.S. 388 (1969); *Anderson v. Martin, supra.*

This court, as well as lower courts, has similarly often expressed the general rule that "[f]ramers of voting districts are required to be color blind." *Ince v. Rockefeller*, 290 F. Supp. 878, 884 (S.D.N.Y. 1968). See also *Gaffney v. Cummings*, 412 U.S. 735, 751 (1965); *White v. Register*, 412 U.S. 755 (1973); *Whitcomb v. Chavis, supra*, 149-160 (1971); *Mann v. Davis*, 245 F.Supp. 241, 245 (E.D. Va.), *aff'd*, 382 U.S. 42 (1965) ("No line may be drawn to prefer by race or color."); *Kilgarlin v. Martin*, 252 F.Supp. 404, 437 (S.D. Tex. 1966), *rev'd* on other

grounds, 386 U.S. 120 (1967); *Cousins v. City Council of Chicago*, 466 F.2d 830, 842-843 (7th Cir. 1972), *cert. denied*, 409 U.S. 893 (1973); *Ferrell v. Oklahoma*, 339 F.Supp. 73, 83 (W.D. Okla.), *aff'd* 409 U.S. 939 (1972); *Zimmer v. McKeithen*, 485 F.2d 1297,1305 (5th Cir. 1972); *Howard v. Adams County Board of Supervisors*, 453 F.2d 455, 457-460 (5th Cir. 1972); *Dobson v. Mayor and City Council of Baltimore*, 330 F.Supp. 1290, 1296 (D. Md. 1971).

To be sure, there have been some instances where this Court has permitted race to be taken into consideration in formulating a remedy for undoing damage caused by a prior history of deliberate discrimination by governmental policy (*Swann v. Charlotte-Mecklenburg Board of Education, supra; Green v. County School Board*, 391 U.S. 430 (1968). But there has never been a case where this Court sanctioned preferential treatment where there was no evidence of prior discrimination.

Against this backdrop one vainly searches the entire record for any delineation of the putative "wrong" that was to be corrected by the 65% non-white majority. The Attorney General made no finding that there was either purposeful or effective abridgment of the voting rights of minorities. In fact, as we argue above, the Justice Department employed an erroneous standard under the Voting Rights Act. Indeed, the only "finding" remotely related to this question was that New York did not translate its ballots into Spanish, and it is significant that the beneficiaries of the 1974 plan were blacks, not the Spanish-speaking minority. (510 F2d 525, fn. 4). Further, the record is totally barren of any description of the relationship, rational or otherwise, of the 65% figure to the supposed "wrong". As stated by Judge Frankel in his dissenting opinion below, at 510 F2d 526:

> "[This] case is one where no preexisting wrong was shown of such a character as to justify, or render congruent, a presumptively odious concept of a racial 'critical mass' as a principle for the fashioning of electoral districts. Indeed, it is a case where no official is willing to accept, let alone to claim, responsibility for the requirement of 65% or over non-white."

The abandonment of the 1972 lines resulted from a patently gross abuse of power and marks a significant breach in the traditional restraints on governmental action. The method employed by the Justice Department and adopted by the New York state legislature was to refashion districts solely with a view toward racial composition and a preordained result. One may ask, if the districts involved here elected white representatives despite the 65% figure, could the Justice Department insist on 70% or 75% or 100%? Could the Justice Department insist on gerrymandered districts to combine non-white communities separated from each other?

The possibilities are endless and frightening.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

Dennis Rapps
c/o National Jewish Commission
on Law and Public Affairs (COLPA)
66 Court Street
Brooklyn, New York 11201

Samuel Rabinove
c/o American Jewish Committee
165 East 56th Street
New York, New York 10022

Attorneys for Amici

Harvey Blitz
Stewart Wahrsager,

Of Counsel